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No. 82-1968

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ARKLA, INC. (formerly ARKANSAS LOUISIANA GAS COMPANY),
Petitioner,

v.

FRANK J. HALL, W. E. HALL, JR., MRS. W. E. HALL, SR., THE H. M. HARRELL TESTAMENTARY TRUST, JAMES E. HARRELL, JOHN K. HARRELL, SR., ASA BENTON ALLEN, STONEY G. MEYERS, JR., W. O. COCHRAN, THOMAS F. PHILYAW, MRS. ELAINE ALLEN, JAMES A. NOE, D. B. MCCONNELL, MRS. EVA L. WEISS, SOL KAPLAN and NATIONAL AMERICAN BANK, NEW ORLEANS, CO-TESTAMENTARY EXECUTORS OF THE SUCCESSION OF SEYMOUR WEISS

FEDERAL ENERGY REGULATORY COMMISSION,
Respondents.

PETITIONER'S REPLY BRIEF TO RESPONDENTS' BRIEFS OPPOSING PETITION FOR A WRIT OF CERTIORARI

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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PETITIONER'S REPLY BRIEF TO RESPONDENTS' BRIEFS OPPOSING PETITION FOR A WRIT OF CERTIORARI

Petitioner, Arkla, Inc. ("Arkla") hereby files its reply to the briefs filed by Frank J. Hall, *et al.* ("Hall") and the Federal Energy Regulatory Commission ("Commission")[1] in opposition to Arkla's petition for a writ of *certiorari*.

REPLY TO BRIEF OF THE FEDERAL ENERGY REGULATORY COMMISSION

1. The Commission argues that the error committed by the court of appeals in exceeding the limits of its review authority

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[1] "Commission" refers to the Federal Energy Regulatory Commission ("FERC") or to the Federal Power Commission ("FPC") depending upon the time period involved. On October 1, 1977 the FPC's relevant responsibilities were transferred to the FERC.

does not warrant exercise by this Court of *certiorari* jurisdiction (Comm. Br. in Opp. 6). The Commission reaches that conclusion in spite of the fact that it states that the court of appeals' decision constitutes "clear error" (Comm. Br. in Opp. 6). The Commission states:

> "For the reasons expressed by Chief Judge Clark in his dissenting opinion below (Pet. App. 29a), we believe that the court of appeals erred in reversing the Commission's order denying respondents' application, pursuant to 15 U.S.C. 717c(d), for a waiver of the filing requirements of the Natural Gas Act. Moreover, we fully agree with Petitioner (Pet. 14-15) that, even if the court of appeals were correct in setting aside the Commission's order, the court should not have required the Commission on remand to grant respondents' request for a waiver. As this Court long ago recognized, once a reviewing court lays bare an agency's error and 'compel[s] obedience to its correction,' it has 'exhausted the only power which Congress gave it.' *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940). See *South Prairie Construction Co.* v. *Local No. 627, International Union of Operating Engineers*, 425 U.S. 800, 805-806 (1976); *NLRB* v. *Food Store Employees Union, Local 347*, 417 U.S. 1, 9-10 (1974); *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952). Thus, at a minimum, the court of appeals should have permitted the Commission to bolster the record or to consider whether other reasons might militate against granting a waiver to respondents. By foreclosing the Commission from considering these alternatives on remand, the court below improperly arrogated to itself the 'power to exercise an essentially administrative function.' Id. at 21."

> "Despite the clear error of the court of appeals, we believe . . . that this issue does not warrant plenary review by this Court." [Br. 5-6]

The foregoing analysis of the court of appeals' decision by the Commission is totally at war with its conclusion that this issue does not warrant review by this Court. In citing *FCC* v. *Pottsville Broadcasting Co.*, *supra*, and other decisions of this Court for the proposition that the court below erred in exceeding its review function, the Commission tacitly admits that there is a conflict between the decision in this case and those

decisions of this Court which it cites. The Commission's argument that the court of appeals' decision is "clear error" goes even further to concede that the decision below is in direct and irreconcilable conflict with the decisions of this Court regarding the limits of federal court review authority.[2] The existence of such a conflict is a well-established ground for the exercise of *certiorari* jurisdiction. Rule 17.1(c); *Egan* v. *City of Aurora*, 365 U.S. 514 (1961). Here the directness of the conflict between the decision in this case and this Court's decisions in *Pottsville* and other cases is a compelling reason for the Court to grant *certiorari*.

Arkla agrees with the Commission's statement that "plenary review" is not warranted in this case (Comm. Br. in Opp. 6), because summary reversal is appropriate to correct the "clear error" committed by the court of appeals below. Rule 23.1; *Rogers* v. *Calumet National Bank*, 358 U.S. 331 (1959); *United States* v. *Haley*, 358 U.S. 644 (1959); *FPC* v. *United Gas Pipe Line Co.*, 393 U.S. 71 (1968). In the *United* case, the same court of appeals reversed a Commission order and itself determined how a formula for allocating consolidated tax savings should be applied. *Certiorari* was granted and the decision of the court of appeals was summarily reversed because, as here, the court had gone beyond the limits of its review authority and projected itself into the domain reserved to the Commission. *See SEC* v. *Chenery Corp.*, 318 U.S. 80, 88, 94 (1943).

The Commission gives three reasons why, even though the court of appeals committed clear error, the exercise of *certiorari* jurisdiction is not warranted. Each of the reasons given by the Commission is without merit.

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[2] The court of appeals' failure to stay within the bounds of its review authority is particularly egregious in this case because it rejected for want of substantial evidence the Commission's reasons for denial of the waiver, one of which it described as "most compelling" (Pet., App. A, p. 15a) and made its own finding that Hall had shown good cause for the waiver—a blatant intrusion on the Commission's functions.

a. The Commission argues first (Comm. Br. in Opp. 6) that the decision of the court of appeals is limited to the particular contract and transaction in this case and will not preclude the Commission in a different case involving a "similar situation regarding a favored nation clause and a royalty payment" from protecting the public interest by ruling at the outset that the favored nation clause was not activated by the royalty payment or by denying the waiver. In the first place, simply because an issue relates to a specific transaction does not mean that it does not involve important federal issues warranting the exercise of *certiorari* jurisdiction. *FCC* v. *Pottsville Broadcasting Co.*, *supra*. In *Pottsville*, a court of appeals decision exceeding the limits of its authority in reviewing a FCC decision regarding a license transaction was found to constitute an important federal issue justifying the exercise of *certiorari* jurisdiction. The same issue exists here and supports the exercise of *certiorari* jurisdiction in this case. Moreover, the grant of *certiorari* in this case could further serve to make clear that the limits of federal court review authority are mandatory and not permissive and as such do not permit the kind of intrusion by a federal court into the exclusive province of the agency that occurred in this case.

Second, the Commission, when it states that it will be able to protect the public interest in the future by holding that a favored nation clause is not triggered by royalty payments or by denying the waiver application, concedes that the effect of the court of appeals' decision precludes it from protecting the public interest in this case. This consequence of the court of appeals' abuse of its review authority warrants *certiorari* review. See infra pp. 5-6. Moreover, contrary to the Commission's contention, the court of appeals' decision will have an adverse effect on the Commission's ability to protect the public interest in other cases. This is because the court of appeals' decision expands the grounds for granting a waiver in a manner that will make retroactive rate increases common. If the court of appeals' decision is allowed to stand, it will provide a precedent for producers to obtain a retroactive rate increase

simply by claiming that they did not possess all of the facts needed to file in a timely manner for a rate increase. Such a showing would under the court of appeals' decision constitute "good cause" for a waiver to allow a retroactive rate increase for any past period despite the prohibition of the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717, *et seq.*, against retroactive ratemaking. To assume that other producers will not use the court of appeals' decision as authority for requiring the Commission to grant waivers in such circumstances is naive. Similarly, as a result of earlier decisions in this case[1] and the court of appeals' decision in *Pennzoil Co.* v. *FERC*, 645 F.2d 360, 380-87 (5th Cir. 1981), *cert. den.* 454 U.S. 1142 (1982), it is clear that the Commission does not possess primary jurisdiction to interpret producer contracts and to protect the public interest in future cases by holding that a price escalation clause is not triggered if the producer, as here, chooses to litigate that issue in another forum more to its liking.

b. The Commission next argues (Comm. Br. in Opp. 7) that the rate impact of the court of appeals' decision is not yet clear and does not support the exercise of *certiorari* jurisdiction. This argument overlooks the fact that the rate impact of this case is exactly the same as it was when this court granted *certiorari* in *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981) ("*Arkla* v. *Hall*"), to review the decision of the Louisiana Court of Appeal. The effect of the federal court of appeals' decision is to reinstate the retroactive rate increase awarded by the Louisiana courts that was reviewed and vacated by this Court in *Arkla* v. *Hall*. Although the Commission has not yet calculated the maximum level of rates, neither had it done so when this case was earlier presented to this Court and *certiorari* was granted. For the reasons expressed by Chief Judge Clark in his dissenting opinion below (Pet., App. A, p. 29a) and because of the adverse impact upon consumers of

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[1] *Hall* v. *Arkansas Louisiana Gas Co.*, 359 So.2d 255 (La. App. 2d Cir. 1978), amended and remanded on other grounds, 368 So.2d 984, *cert. den.* 444 U.S. 878 (1980).

the retroactive rate increase granted by the court of appeals, the rate impact of this case supports the exercise of *certiorari* jurisdiction.

c. Finally, the Commission, citing *Presbyterian Hospital* v. *Harris*, 638 F.2d 1381 (5th Cir. 1981), and *Shell Oil Co.* v. *FERC*, 707 F.2d 230 (5th Cir. 1983),[4] argues (Comm. Br. in Opp. 7) that the court of appeals' abuse of its review authority does not merit *certiorari* review because it is unlikely that the court will repeat its error in future cases since both before and after this case, opinions were rendered in which the court stayed within the limits of its review authority. The Commission's argument that the court of appeals is not likely to repeat its error (Comm. Br. in Opp. 7) points out the conflict between the decision below and other decisions of the court of appeals. Again, this is a consideration that supports the grant of *certiorari* in this case. Rule 17.1(a); *Bingler* v. *Johnson*, 394 U.S. 741 (1969). Indeed, the Commission's argument that the court of appeals is not likely to repeat its error entirely misses the point. The point is that the limits of judicial review authority have been established as a principle of federal law which should be applied consistently in all cases. *Id.* The court of appeals' adherence to the limits of its review authority in one case does not mean the court of appeals will observe those limits in other cases. The court of appeals did not stay within the limits of its review authority in this case despite summary reversal by this Court in *United*, *supra*, and the court of appeals' own decision in *Presbyterian Hospital*. That the court of appeals may not commit the same error in later cases is not only belied by experience, but additionally, does not make the issue any less important nor any less a question for *certiorari* in this case.

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[4] In *Shell Oil*, the court of appeals reversed the Commission on the ground that the Commission's findings were not supported by substantial evidence and remanded the case for further proceedings consistent with the decision. It is noteworthy that the court stated that its decision did not preclude the Commission from bolstering the record on remand and reaching the same decision (707 F.2d at 236, n.9). *See Chenery*, *supra*; *SEC* v. *Chenery*, 332 U.S. 194, 200-201 (1947).

For these reasons, *certiorari* should be granted to review that aspect of the court of appeals' decision which conflicts with the decisions of this Court and other decisions of the court of appeals regarding the limits of federal court review authority. Summary reversal of the court of appeals' decision is appropriate under Rule 23.1 because it is clearly erroneous.

2. With respect to Arkla's second *certiorari* question—the conflict between the decision of the court of appeals and this Court's decision in *Arkla* v. *Hall*—the Commission makes conclusory statements that no conflict exists despite the clear examples of the conflict cited in Arkla's petition (Pet. 19-23). Although the Commission attempts to downplay a few of the many conflicts cited by Arkla in its petition, the Commission does not quarrel with the basic proposition that the court of appeals' decision transforms the dissent in *Arkla* v. *Hall* into the majority opinion. Moreover, the Commission avoids addressing one of the most fundamental conflicts between the court of appeals' decision and *Arkla* v. *Hall*—the conflict between the court of appeals' finding that the rate increase is of a *prospective* nature (Pet., App. A, 13a-15a) and this Court's holding in *Arkla* v. *Hall* that this case involves a *retroactive* rate increase (453 U.S. at 578-579). It was on the basis of its finding that this case involves a *prospective* rate increase that the court of appeals circumvented the "statutory bias" against *retroactive* rate increases. Cf. *Gillring* v. *FERC*, 566 F.2d 1323, 1325 (5th Cir. 1978), *cert. den.* 439 U.S. 823 (1978). This fundamental conflict between the court of appeals' decision and this Court's decision in *Arkla* v. *Hall* supports the exercise of *certiorari* jurisdiction.

3. With respect to Arkla's third *certiorari* issue— whether a waiver of the requirements of Section 4(d) of the NGA is available for collection of a retroactive rate increase—the Commission does not refute the importance of this issue which this Court expressly left open in *Arkla* v. *Hall* (453 U.S. at 578, n. 8). The Commission's argument (Comm. Br. in Opp. 9-10) that *certiorari* is not warranted relies on *City of Piqua* v. *FERC*, 610 F.2d 950 (D.C. Cir. 1979), and attempts to distinguish the decisions cited by Arkla (Pet. 24-26) which clearly set forth the proposition that the effectiveness of a rate change

under Section 4(d) of the NGA cannot precede the date on which the notice of rate change is filed. The Commission's reliance on *Piqua* is misplaced—in fact, the Commission itself distinguished *Piqua* in the court of appeals (Comm. Br. in Court of Appeals 18; see the Appendix to this brief at p. 2a). As is shown in Arkla's petition (Pet. 21, 23-26), *Piqua* is not only distinguishable from the instant case, it is in direct conflict with the other decisions interpreting Section 4(d) of the NGA. The Commission next argues (Comm. Br. in Opp. 9) that "the statements" in the other cases relied upon by Arkla that interpret Section 4(d) "may be regarded as *dicta*." These "statements" are not *dicta* but are central to the holdings of the decisions. See *Continental Oil Co.* v. *FPC*, 236 F.2d 839, 843 (5th Cir. 1956); *Shell Oil Co.* v. *FPC*, 334 F.2d 1002, 1008-1009 (3rd Cir. 1964). In *Continental Oil*, the court addressed the waiver provision of Section 4(d) and held that a waiver was not available for a retroactive rate increase. In *Shell Oil*, the court determined that Section 4(d) did not permit a retroactive rate increase which, like the instant case, was based on a favored nation clause. The court said "we find nothing in the Act which authorizes a natural gas company to retroactively amend existing rates either by contract or otherwise" (334 F.2d at 1009). Under these decisions, it is clear that the Commission does not have the authority under the waiver provision of Section 4(d) to give effect retroactively to a change in rates.

4. With respect to Arkla's fourth *certiorari* question—the denial of an opportunity for *en banc* review—the Commissioon makes only a footnote reference to the issue in which it asserts that the disqualification issue should be remedied by legislation or amendments to the rules and not by employing the Court's *certiorari* jurisdiction. The Commission's suggestion will not remedy the error of the court of appeals' decision. Arkla respectfully submits that the denial of an opportunity for *en banc* review in this case is another reason that this Court should grant *certiorari*.[3]

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[3] The problem of judicial disqualification on suggestions for rehearing *en banc* was recently discussed at length in *Arnold* v. *Eastern Airlines, Inc.*, No. 80-1245, *et al.* (4th Cir., filed July 8, 1981).

REPLY TO HALL'S BRIEF

Hall's brief in opposition does not address the questions presented in Arkla's petition. Instead, Hall's brief is devoted to a continuation of Hall's effort in the state courts, in this Court in *Arkla* v. *Hall*, in the court below, and before the Commission to paint Arkla as the "villain."[6] Hall continues to charge that Arkla deliberately withheld information regarding the royalty payments to the government and thereby prevented Hall from making a timely filing for a rate increase or an earlier application for waiver. (Hall Br. in Opp. 8-11). Each of the state courts, this Court in *Arkla* v. *Hall*, and the Commission rejected Hall's claim of a deliberate withholding of information. This Court in *Arkla* v. *Hall* (453 U.S. at 583) agreed with the Commission and the state courts that there was no deliberate withholding of facts regarding royalty payments by Arkla. This Court agreed (453 U.S. at 583, n. 13) with the Commission that Arkla could reasonably have concluded that the favored nation clause was not activated. It was not the lack of information that accounted for Hall's failure to file for a rate increase or to apply for a waiver of the notice requirements of Section 4(d) of the NGA, for when undeniably possessed of the facts regarding the royalty payments in 1974, Hall made no rate filing or application for waiver, deciding to by-pass the Commission and sue for damages in the state court.

Hall also cites a series of court and administrative decisions, as it did in the court of appeals, which Hall wrongly asserts over and over again (Br. in Opp. 2-3, 4, 5, 7-8, 9, 14, 17-18, 19-21, 24-25, 26) involved the grant of waivers by the Commission in fact situations similar to those involved in this case, and therefore, support the court of appeals' reversal of the Com-

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[6] The rhetoric employed in Hall's brief, particularly the statements that Arkla "threatened" and "intimidated" the court below and the D.C. Circuit court of appeals in another phase of this case (Hall Br. in Opp. 25-29) exceeds the bounds of proper argument and is utterly without support. *Arkla takes strong exception to such rhetoric.*

mission's denial of the waiver. Significantly, not one of the decisions relied on by Hall was discussed or cited by the court of appeals in its decision. As the Commission correctly pointed out in its brief in the court of appeals, none of the decisions cited by Hall supports the granting of a waiver for a retroactive rate increase in this case (Comm. Br. in Court of Appeals 17-20; see Appendix to this brief).

In sum, nothing appears in Hall's opposition brief to support either the court of appeals' erroneous reversal of the Commission's order or denial of Arkla's petition.

CONCLUSION

The Commission agrees with Arkla that the court of appeals' decision reversing the Commission's order and directing the Commission to grant Halls' application for a waiver of the filed rate doctrine and to grant Hall a retroactive rate increase was "clear error" because the court exceeded the limits of its review authority and usurped the Commission's functions. On that *certiorari* question, the petition should be granted and the judgment of the court below summarily reversed without further briefs or argument since the decision of the court is so clearly erroneous, contrary to, and in conflict with, the decisions of this Court on the question presented.

This petition for *certiorari* should also be granted with respect to the other questions presented and the decision of the court of appeals reversed for the reasons stated in the petition for the writ and in this reply brief.

Respectfully submitted,

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APPENDIX

APPENDIX

BRIEF OF FEDERAL ENERGY REGULATORY COMMISSION IN THE COURT OF APPEALS, NO. 81-4011, PAGES 17-20

[17]

2. The Hall Group's Claim That In Similar Cases The Commission Permitted Retroactive Rate Increases Is Incorrect.

The Hall Group argues throughout its brief (e.g., Br. at 30, citing Br. at 16 n.12), that the Commission has "since 1938" granted waivers in situations similar to this case and cites 19 alleged instances.[18] Hall's citations do not, however, show any consistent practice applicable in the present context since none involved a favored nations clause or a 20-year old rate.

Moreover, of the court decisions relied upon, two—*Moss* v. *C.A.B.*, 521 F.2d 298 (D.C. Cir. 1976) and *Southern Railway Co.* v. *U.S.*, 412 F. Supp. 1122 (D.C. Cir. 1976)—do not involve this Commission. Three others,[19] involve situations where a jurisdictional company had not submitted to Commission regulation and the courts permitted the Commission to recreate the past, i.e. assume that the company complied with Commission rules when [18] that assumption aided the public interest.[20] Here, on the other hand, recreation of the past would mean a rate increase and harm to the public interest.

The only court case the Hall Group cite involving a "waiver" of the statutory notice requirements is *City of Piqua* v. *FERC*,

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[18] *City of Piqua* v. *FERC*, 610 F.2d 950 (D.C. Cir. 1979); and *Dayton Power & Light Co.*, F.E.R.C., Docket No. ER77-546 (1978) are the same case.

[19] *Plaquemines Oil & Gas Co.* v. *FPC*, 450 F.2d 1134 (D.C. Cir. 1971); *Niagra Mohawk* v. *FPC*, 379 F.2d 153 (D.C. Cir. 1967); *Central Maine Power Co.* v. *FPC*, 345 F.2d 875 (1st Cir. 1965).

[20] *I.e.*, lowering rates or paying license fees to the government.

supra. But that case does not aid its position (610 F.2d at 954):

> [T]he present situation is immediately distinguishable. In this case, [the] parties agreed on new rate schedules and on the effective date for the new contract. The negotiated rate change was not retroactive; it was prospective from the date of the contract.

It is one thing to waive a four-month delay in filling the contract where the waiver clearly reflects the intent of the parties. It is quite another to grant the Hall group a rate increase where the parties are in conflict as to the propriety of the increase and where, a waiver could result in a welter of rate reopenings (*see supra* pp. 13-14).

Nor are any of the administrative cases relied upon in point. In *Duke Power Co.*,[21] 43 FPC 551, 554 (April 21, 1970), the Commission issued two orders on the same day in the same docket. In the first, the Commission explicitly noted that the rate [19] filings that the Agency accepted resulted in a rate reduction,[22] 43 FPC at 551. In the second, 43 FPC at 554, the Commission found that no rate change resulted.[23]

Moreover, in *Duke Power*, the rate filings did not become effective retroactively; rather they became effective during a suspension period of previous rates, something which violated the Commission's own regulations, and for which the company needed a waiver.

New England Power Co., 3 FPS 5-415 (Docket Nos. E-7700, E-7729, E-7800, (December 6, 1974)[24] concerned a situation

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[21] Though the petitioners list Docket E-7513 as having a February 9, 1970, order, the FPC reports indicate that two orders were issued April 21, 1970, in that docket.

[22] Similarly, *Oklahoma Gas & Electric*, 15 FPS 5-112 (1978) involved a retroactive rate reduction, as did *Consumers Power Co.*, Docket No. ER78-437 (June 27, 1978).

[23] In addition, *Arizona Public Service Co.*, (Docket No. ER77-188, April 11, 1977) did not involve rate changes.

[24] Though the Hall Group lists an order of May 19, 1972 an order in E-7729 actually was issued on December 6, 1974.

where the Commission had, on rehearing, two months after the original order accepting a tariff, discovered that the filing was inconsistent with a rate settlement. Thus, the agency revoked the acceptance and ordered a refund of revenues collected under the agency's erroneous earlier order.

Again, *Boston Edison Co.*, 50 FPC 557 (1973); *Kansas City Power & Light Co.*, Docket No. ER78-25 (Nov. 17, 1977); *Arizona Public Service Co.*, Docket No. ER78-429 (Order of July 13, 1978); *Utah Power & Light Co.*, Docket No. ER78-216 (June 30, 1978); [20] *Northern States Power Co.*,[25] ER77-593 (December 2, 1977)[26] all concerned situations where the Commission gave tariffs covering service agreements retroactive effect back to the dates when service actually began, in order that the service would not have been provided free of charge.

Finally, *Arizona Public Service Co.*, 7 FPS 5-112 (September 16, 1975) involved retroactivity only to the extent that the company made an adjustment at the end of the month, to cover changes during the month and *Electric Energy, Inc.*, Docket No. ER77-176 (April 7, 1977) involved retroactivity for one month before the filing date, unlike the Hall Group's 20 years.[27]

In sum, the Hall Group has requested the Commission to grant a singular type of relief with no support in precedent. After carefully evaluating all the relevant considerations, the Commission refused to grant such an unusual remedy. There is no reason for this Court to reverse this discretionary ruling.

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[25] The Hall's Group brief (Br. at 6 n.12) refers to this case as "*North States*."

[26] The unreported orders referred to in this section of the brief are attached in Appendix D.

[27] The Commission could not locate a June 30, 1977, order in *Potomac Electric Power Co.*, Docket No. ER77-429, as cited in the petitioner's brief (Br. at 46 n.42).